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Attorneys for Defendant
FEDERAL INSURANCE COMPANY

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

CALIFORNIA CASUALTY
INSURANCE COMPANY,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY,
DOES 1-10, ROES 1-10, AND MOES 1-
10, inclusive

Defendant.

Case No. CV 08-2701 VRW

[Assigned to the Honorable Vaughn R.
Walker]

**FEDERAL INSURANCE
COMPANY'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT
OF ITS MOTION FOR SUMMARY
JUDGMENT OR, IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Date: December 11, 2008
Time: 2:30 p.m.
Ctm: 6

[Notice of Motion and Motion for
Summary Judgment; Memorandum in
Support of Motion; Declaration of Jeffrey
Gunchick filed; and [Proposed] Order
lodged concurrently]

Pursuant to Rule 201 of the Federal Rules of Evidence, Defendant Federal Insurance Company hereby requests that the Court take judicial notice of the following documents described below:¹

1. The special verdict lodged on May 1, 2006 in the lawsuit captioned, James Harold, et al. v. California Casualty Insurance Company, et al., Cal. Super. Ct., Case No. 02AS04291, a copy of which is attached hereto as Exhibit 1.

2. A letter dated January 19, 2001 from William W. Anderson of Anderson Environmental Consulting Group to Bernard Sequeira of Westmont Construction (the "Anderson Mold Report") that was a trial exhibit in the above-captioned lawsuit, a copy of which is attached hereto as Exhibit 2.

Dated: August 21, 2008

Respectfully Submitted,

STROOCK & STROOCK & LAVAN LLP
MICHAEL F. PERLIS
ALLAN S. COHEN
RICHARD R. JOHNSON

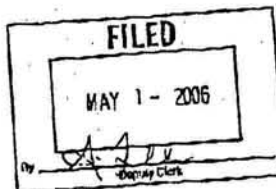
By: /s/ Michael F. Perlis
Michael F. Perlis

Attorneys for Defendant
FEDERAL INSURANCE COMPANY

¹ This Court may take judicial notice of documents filed and orders or decisions entered in federal or state court. See, e.g., Doran v. Eckold, 409 F.3d 958, 962, fn. 1 (8th Cir. 2005) (judicially noticing documents considered by District Court at summary judgment stage but not admitted at trial); Holder v. Holder, 305 F.3d 854, 866 (9th Cir. 2002) (judicially noticing California Court of Appeal's opinion, the briefs filed in that proceeding, and the briefs filed in the trial court).

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO



JAMES HAROLD and D. LEE HAROLD,
individuals,
Plaintiff(s).

Case Number: 02AS04291

Department: 31

vs.

SPECIAL VERDICT

CALIFORNIA CASUALTY INSURANCE
COMPANY, WESTMONT
CONSTRUCTION, INC.,
Defendant(s).

We, the Jury in the above entitled action, find the following special verdict on
the questions submitted to us:

NEGLIGENCE

Negligence - Westmont

Question No. 1: Do you find that Westmont Construction, Inc.,
("Westmont") was negligent?

Answer:

Yes

No

X _____

If you answered "yes" to Question 1, please proceed to Question 2. If you
answered "no" to Question 1, please proceed to Question 10.

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EXHIBIT 1 PAGE 2

Question No. 2: Do you find that Westmont's negligence was a substantial factor in causing harm to the Harolds?

Answer: Yes ☒ No ☐

If you answered "yes" to Question 2, please proceed to Question 3. If you answered "no" to Question 2, please proceed to Question 10.

Failure to Hire Qualified Contractor/Special Risk - California Casualty

Question No. 3: Do you find that California Casualty hired Westmont to repair the Harolds' residence?

Answer: Yes ☒ No ☐

If you answered "yes" to Question 3 please proceed to Question 4. If you answered "no" to Question 3, please proceed to Question 10.

Question No. 4: Do you find that California Casualty failed to exercise reasonable care to employ a qualified contractor when it chose to hire Westmont to perform repairs at the Harolds' residence.

Answer: Yes ☒ No ☒

If you answered "yes" to Question 4 please proceed to Question 5. If you answered "no" to Question 4, please proceed to Question 8.

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EXHIBIT 1 PAGE 3

Question No. 5: Do you find that California Casualty's hiring of Westmont was a substantial factor in causing physical harm to person or property?

Answer: Yes X No

Please proceed to Question 6.

Question No. 6: Do you find that the work was likely to involve a special risk of harm to person or property?

Answer: Yes X No

If you answered "yes" to Question 6 please proceed to Question 7. If you answered "no" to Question 6 please proceed to Question 10.

Question No. 7: Do you find that California Casualty knew or should have known that the work was likely to involve this risk?

Answer: Yes X No

If you answered "yes" to Question 7 please proceed to Question 8. If you answered "no" to Question 7, please proceed to Question 10.

Question No. 8: Do you find that Westmont failed to use reasonable care to take specific safety measures appropriate to the danger to avoid the risk?

Answer: Yes X No

If you answered "yes" to Question 8 please proceed to Question 9. If you

answered "no" to Question 8, please proceed to Question 10.

Question No. 9: Do you find that Westmont's failure was a cause of harm to the Harolds?

Answer:

Yes No

X _____

Please proceed to Question 10.

BREACH OF CONTRACT

Question No. 10: Do you find that California Casualty breached the insurance contract with the Harolds?

Answer:

Yes No

X _____

Proceed to Question No. 11.

BREACH OF THE OBLIGATION OF GOOD FAITH & FAIR DEALING

Question No. 11: Do you find that California Casualty breached the obligation of good faith and fair dealing by unreasonably failing to pay, or delaying payment, of policy benefits?

Answer:

Yes No

X _____

Please proceed to Question No. 12.

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EXHIBIT 1 PAGE 5

Question No. 15: Did Westmont create a condition that was harmful to health, or was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property?

Yes No

Answer:

X _____

If you answered "yes" to Question 15 please proceed to Question 16. If you answered "no" to Question 15 please proceed to Question 21.

Question No. 16: Do you find that this condition interfered with the Harolds' use and enjoyment of the land?

Yes No

Answer:

X _____

If you answered "yes" to Question 16, please proceed to Question 17. If you answered "no" to Question 16, please proceed to Question 21.

Question No. 17: Do you find that the Harolds consented to Westmont's conduct?

Yes No

Answer:

_____ X

If you answered "yes" to Question 17, please proceed to Question 21. If you answered "no" to Question 17, please proceed to Question 18.

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EXHIBIT 1 PAGE 6

EXHIBIT E EXHIBIT D EXHIBIT C EXHIBIT B EXHIBIT A

Question No. 12: Do you find that California Casualty breached the obligation of good faith and fair dealing by failing to properly investigate the loss?

Answer: Yes No
_____ X _____

Please proceed to Question No. 13.

Question No. 13: Do you find that California Casualty breached the obligation of good faith and fair dealing by failing to reasonably inform the Harolds of their rights and obligations under the insurance policy?

Answer: Yes No
X _____

Please proceed to Question No. 14.

Question No. 14: If you answered "yes" to either Question 11, Question 12, or Question 13, do you find that California Casualty's breach of the obligation of good faith and fair dealing was a substantial factor in causing harm to the Harolds?

Answer: Yes No
X _____

Please proceed to Question No. 15.

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EXHIBIT 1 PAGE 7

EXHIBIT F

EXHIBIT G

EXHIBIT H

EXHIBIT I

Question No. 18: Do you find that an ordinary person would have been reasonably annoyed or disturbed by Westmont's conduct?

Answer: Yes ☒ No ☐

If you answered "yes" to Question 18, please proceed to Question 19. If you answered "no" to Question 18, please proceed to Question 21.

Question No. 19: Do you find that Westmont's conduct was a substantial factor in causing harm to the Harolds?

Answer: Yes ☒ No ☐

If you answered "yes" to Question 19, please proceed to Question 20. If you answered "no" to Question 19, please proceed to Question 21.

Question No. 20: Do you find that the seriousness of the harm outweighed the public benefit?

Answer: Yes ☒ No ☐

Please proceed to Question 21.

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EXHIBIT 1 PAGE 8

NUISANCE - California Casualty

Question No. 21: Did California Casualty, or its agents as defined in the jury instructions, create a condition that was harmful to health, or was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property?

Answer: Yes ☒ No ☐

If you answered "yes" to Question 21 please proceed to Question 22. If you answered "no" to Question 21, please proceed to Question 27.

Question No. 22: Do you find that this condition interfered with the Harolds' use and enjoyment of the land?

Answer: Yes ☒ No ☐

If you answered "yes" to Question 22, please proceed to Question 23. If you answered "no" to Question 22, please proceed to Question 27.

Question No. 23: Do you find that the Harolds consented to California Casualty's conduct?

Answer: Yes ☐ No ☒

If you answered "yes" to Question 23, please proceed to Question 27. If you answered "no" to Question 23, please proceed to Question 24.

Question No. 24: Do you find that an ordinary person would have been reasonably annoyed or disturbed by California Casualty's conduct?

Answer:

Yes No

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If you answered "yes" to Question 24, please proceed to Question 25. If you answered "no" to Question 24, please proceed to Question 27.

Question No. 25: Do you find that California Casualty's conduct was a substantial factor in causing harm to the Harolds?

Answer:

Yes No

☒ ☐

If you answered "yes" to Question 25, please proceed to Question 26. If you answered "no" to Question 25, please proceed to Question 27.

Question No. 26: Do you find that the seriousness of the harm outweighed the public benefit?

Answer

Yes No

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Please proceed to Question 27.

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EXHIBIT 1 PAGE 10

EXHIBIT 6

EXHIBIT 7

CONCEALMENT - Westmont

Question No. 27: Do you find that Westmont intentionally failed to disclose the Anderson Mold Report to the Harolds?

Yes No
 Answer: X

If you answered "yes" to Question 27, please proceed to Question 28. If you answered "no" to Question 27, please proceed to Question 31.

Question No. 28: Do you find that Westmont intended to deceive the Harolds by concealing the Anderson Mold Report?

Yes No
 Answer:

If you answered "yes" to Question 28, please proceed to Question 29. If you answered "no" to Question 28, please proceed to Question 31.

Question No. 29: Do you find that the Harolds reasonably relied on Westmont's deception?

Yes No
 Answer:

If you answered "yes" to Question 29, please proceed to Question 30. If you answered "no" to Question 29, please proceed to Question 31.

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Question No. 30: Was Westmont's concealment a substantial factor in causing harm to the Harolds?

Yes No

Answer: _____

Please proceed to Question 31.

CONCEALMENT - California Casualty

Question No. 31: Do you find that California Casualty intentionally failed to disclose the Anderson Mold Report to the Harolds?

Yes No

Answer: _____

If you answered "yes" to Question 31, please proceed to Question 32. If you answered "no" to Question 31, please proceed to Question 35.

Question No. 32: Do you find that California Casualty intended to deceive the Harolds by concealing the Anderson Mold Report?

Yes No

Answer: _____

If you answered "yes" to Question 32, please proceed to Question 33. If you answered "no" to Question 32, please proceed to Question 35.

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EXHIBIT

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Question No. 33: Did you find that the Harolds reasonably relied on California Casualty's deception?

Answer: Yes X No

If you answered "yes" to Question 33, please proceed to Question 34. If you answered "no" to Question 33, please proceed to Question 35.

Question No. 34: Was California Casualty's concealment a substantial factor in causing harm to the Harolds?

Answer: Yes X No

Please proceed to Question 35.

DAMAGES

Breach of Contract

Question No. 35: If you answered "yes" to Question 10, what is the amount of the covered loss under the insurance contract that California Casualty failed to pay for the residence? The maximum amount that can be awarded for breach of contract is \$256,000 due to the existence of the credit of \$251,000.

Answer: \$ 256,000.00

Regardless of how you answered Question 10 and Question 35, please proceed to Question 36.

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EXHIBIT 1 PAGE 13

EXHIBIT G

EXHIBIT F

EXHIBIT C

EXHIBIT D

Breach of the obligation of good faith and fair dealing

Question No. 36: If you answered "yes" to Question 14, what are the damages for breach of the obligation of good faith and fair dealing?

Answer:

A	Economic Damage for James and D. Lee Harold	\$ 75,450.00
D	Past Non-Economic Damage for James Harold	\$ 75,000.00
C	Future Non-Economic Damage for James Harold	\$ 0
D	Past Non-Economic Damage for D. Lee Harold	\$ 75,000.00
E	Future Non-Economic Damage for D. Lee Harold	\$ 0
Total:		\$ 225,450.00

Regardless of how you answered Question 14 and Question 36, please proceed to Question 37.

Negligence - Westmont

Question No. 37: If you answered "yes" to Question 2, what are the damages for Westmont's negligence?

Answer:

A	Economic Damage for James and D. Lee Harold	\$ 75,000.00
B	Past Non-Economic Damage for James Harold	\$ 37,500.00
C	Future Non-Economic Damage for James Harold	\$ 0
D	Past Non-Economic Damage for D. Lee Harold	\$ 37,500.00
E	Future Non-Economic Damage for D. Lee Harold	\$ 0
Total:		\$ 150,000.00

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EXHIBIT 1 PAGE 14

Regardless of how you answered Question 2 and Question 37, please proceed to Question 38.

Failure to Hire Qualified Contractor/Special Risk of Harm - California Casualty

Question No. 38: If you answered "yes" to Question 5 or Question 9, what are the damages for California Casualty's failure to hire a qualified contractor, or for special risk of harm?

Answer:

A	Economic Damage for James and D. Lee Harold	\$ 494,700.00
B	Past Non-Economic Damage for James Harold	\$ 125,000.00
C	Future Non-Economic Damage for James Harold	\$ 0
D	Past Non-Economic Damage for D. Lee Harold	\$ 125,000.00
E	Future Non-Economic Damage for D. Lee Harold	\$ 0
Total:		\$ 744,700.00

Are any of the damages listed in the answer to Question 38 the same damages that you have awarded in response to a different question? Damages are considered the "same" if they were awarded for the same harm.

Yes No

Answer:

 X

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EXHIBIT 1 PAGE 15

EXHIBIT G

EXHIBIT F

If you answered "yes", identify the Answer(s) and the amount of any duplicated damages included in your answer to Question No. 38:

Answer:

Answer No.:

Duplication

\$

Regardless of how you answered Question 5, Question 9, and Question 38, please proceed to Question 39.

Question No. 39: If you answered both Question No. 37 and Question No. 38, what is the apportionment of fault between Westmont and California Casualty?

Answer:

A Westmont

17

%

B California Casualty

83

%

Total:

100%

Please proceed to Question 40.

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Nuisance - Westmont

Question No. 40: If you answered "yes" to Question 20, what are the damages for the nuisance caused by Westmont?

Answer:

A Economic Damage for James and D. Lee Harold	\$ <u>0</u>
B Past Non-Economic Damage for James Harold	\$ <u>2,500.00</u>
C Future Non-Economic Damage for James Harold	\$ <u>0</u>
D Past Non-Economic Damage for D. Lee Harold	\$ <u>2,500.00</u>
E Future Non-Economic Damage for D. Lee Harold	\$ <u>0</u>
Total:	\$ <u>5,000.00</u>

Are any of the damages listed in the answer to Question 40 the same damages that you have awarded in response to a different question? Damages are considered the "same" if they were awarded for the same harm.

Yes No

Answer:

 X

If you answered "yes" identify the Answer(s) and the amount of any duplicated damages included in your answer to Question No. 40:

Answer:

Answer No.:

Duplicate:

\$

Regardless of how you answered Question 20 and Question 40, please proceed to Question 41.

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Nuisance - California Casualty

Question No. 41: If you answered "yes" to Question 28, what are the damages for the nuisance caused by California Casualty?

Answer:

A	Economic Damage for James and D. Lee Harold	\$ 102,543.00
B	Past Non-Economic Damage for James Harold	\$ 262,500.00
C	Future Non-Economic Damage for James Harold	\$ 75,000.00
D	Past Non-Economic Damage for D. Lee Harold	\$ 262,500.00
E	Future Non-Economic Damage for D. Lee Harold	\$ 75,000.00
Total:		\$ 777,543.00

Are any of the damages listed in the answer to Question 41 the same damages that you have awarded in response to a different question? Damages are considered the "same" if they were awarded for the same harm.

Yes No

Answer:

X

If you answered "yes", identify the Answer(s) and the amount of any duplicated damages included in your answer to Question No. 41:

Answer:

Answer No.: _____

Duplication \$ _____

Regardless of how you answered Question 28 and Question 41, please proceed to Question 42.

Question No. 41: If you answered both Question No. 40 and Question No. 40, what is the apportionment of fault between Westmont and California Casualty?

Answer:

A	Westmont	<u>1</u>	%
B	California Casualty	<u>99</u>	%
Total:		<u>100%</u>	

Concealment - Westmont

Question No. 43: If you answered "yes" to Question 30, what are the damages for Westmont's concealment?

A	Economic Damage for James and D. Lee Harold	\$	<u> </u>
B	Past Non-Economic Damage for James Harold	\$	<u> </u>
C	Future Non-Economic Damage for James Harold	\$	<u> </u>
D	Past Non-Economic Damage for D. Lee Harold	\$	<u> </u>
E	Future Non-Economic Damage for D. Lee Harold	\$	<u> </u>
Total:		\$	<u> </u>

Are any of the damages listed in the answer to Question 43 the same damages that you have awarded in response to a different question? Damages are considered the "same" if they were awarded for the same harm.

Yes No

Answer:

If you answered "yes", identify the Answer(s) and the amount of any duplicated damages included in your answer to Question No. 43:

Answer:

Answer No. _____

Duplication \$ _____

Regardless of how you answered Question 30 and Question 43, please proceed to Question 44.

Concealment - California Casualty

Question No. 44: If you answered "yes" to Question 34, what are the damages for California Casualty's concealment?

Answer:

A. Economic Damage for James and D. Lee Harold	\$ <u>133,090.73</u>
B. Past Non-Economic Damage for James Harold	\$ <u>6,500.00</u>
C. Future Non-Economic Damage for James Harold	\$ <u>0</u>
D. Past Non-Economic Damage for D. Lee Harold	\$ <u>6,500.00</u>
E. Future Non-Economic Damage for D. Lee Harold	\$ <u>0</u>
Total:	\$ <u>146,090.73</u>

Are any of the damages listed in the answer to Question 44 the same damages that you have awarded in response to a different question? Damages are considered the "same" if they were awarded for the same harm.

Yes No

Answer: _____

X

If you answered "yes," identify the Answer(s) and the amount of any duplicated damages included in your answer to Question No. 44:

Answer:

Answer to:

Duplicate on

\$

Dated

5-1-06

Foreperson

Cherise Gallo

20

EXHIBIT

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PAGE

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EXHIBIT D

EXHIBIT C

EXHIBIT G

EXHIBIT F

EXHIBIT 2

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PAGE 13/15

By: WESTMONT CONSTRUCTION INC.

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Page 4/7



ANDERSON ENVIRONMENTAL CONSULTING GROUP

3550 WATT AVENUE, SUITE 140
SACRAMENTO, CALIFORNIA 95821

January 19, 2001

Mr. Barnard Sequeira
Westmont Construction
4731 El Camino Avenue
Carmichael, California 95608-4938RE: Testing of Mold for Suspected Indoor Air Contaminants
1160 Glen Aulin Court, Carmichael, California

Dear Mr. Sequeira:

Attached is the laboratory report outlining the contents of the sample collected from the laundry room subfloor at 1160 Glen Aulin Court in Carmichael, California on Thursday, January 4, 2001. One sample of wet particle board flooring, with black mold, was collected.

Laboratory analysis shows that both bacteria and fungi are present in the materials collected from the laundry room floor. The concentrations of bacteria are below industry standard levels described as "clean." The concentrations of fungi are above industry standard levels described as "clean." For reference purposes, "clean" levels (for purposes of duct cleaning/disinfecting) established by the University of California, Davis, are 8,000 CFU/gram or less for bacteria, and 50,000 CFU/gram or less for fungi. A CFU is a Colony Forming Unit, which is the basic unit for microbial measurement.

The sample was sent via FEDEX to Aigner-McLaughlin Associates in Portland, Oregon for culturing to determine the presence of fungi and bacteria. These analyses are an initial screening for total bacteria (no attempt is made to identify the individual types of bacteria) and a screening for fungi, in which the different fungal types are identified. The results are as follows:

Sample 100401 - Bacteria in this sample measured 1,480 CFU/gram. Fungi in this sample measured more than one million CFU/gram, and consisted of *Penicillium* (80%) and *Streptomyces* (20%). No *Thermoactinomyces*, a form of fungus that attaches to bacteria, was detected.

Most fungi produce toxic particles called mycotoxins which may cause flu-like and cold symptoms, headaches, nosebleeds, dermatitis, and suppression of the immune system. A suppressed immune system can make it easier for other opportunistic infections and diseases to enter the body. Mycotoxins are generally nonvolatile, and inhalation opportunity occurs only when accumulations of the fungus are physically disturbed or agitated. The mycotoxins most widely recognized have been associated with *Aspergillus* and *Penicillium* fungi.

EXHIBIT 2 PAGE 22

TELEPHONE: (916) 482-2800

FACSIMILE: (916) 482-0380

EXHIBIT A

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PAGE 14/15

By: WESTMONT CONSTRUCTION INC

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Westmont Construction
January 19, 2001
Page Two

Mycotoxins associated with *Penicillium* include the following:

Ochratoxin has been implicated in damage to the kidneys and liver, and is suspected to impair the immune system. *Ochratoxin* is also a suspected carcinogen.

Citrinin is a nephrotoxin produced by *Penicillium* and *Aspergillus* species. Renal damage, vasodilatation, and bronchial constriction are some of the health effects associated with the toxin.

Gliotoxin is an immunosuppressive toxin produced by species of *Alternaria*, *Penicillium*, and *Aspergillus*.

Patulin is a mycotoxin produced by *Penicillium*, *Aspergillus*, and other fungi. It is believed to cause hemorrhaging in the brain and lungs and is usually associated with apple and grape spoilage.

Penicillic Acid

Several patterns of illness can arise from exposure to allergens including allergic reactions on the skin, in the nose, in the airways, or in the alveoli (branches of the lungs). It is not known why some people are allergic to otherwise harmless pollens or other airborne particles, but it is presumably due to differences in their immune systems. These differences may be partly genetic since allergy-based conditions often run in families. It has been estimated that about 20% of the U. S. population may have a genetic predisposition toward allergies. Conditions which may be produced by airborne allergens and contaminants include allergic rhinitis, asthma, and hypersensitivity pneumonitis.

Allergic rhinitis is an acute condition which resolves readily when the source is removed. It is characterized by the dilation and edema of nasal mucosa and mucus secretion. Typical symptoms include sneezing, itching, red/itching eyes, and obstruction of nasal passages. Asthma is a chronic condition which is characterized by dilation of the breathing passages and reduced oxygen exchange in the lungs. Symptoms include breathing difficulties, wheezing, and occasional skin irritations. Fungi identified as causes of allergic rhinitis and asthmatic episodes include *Penicillium*.

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PAGE 15/15

By: WESTMONT CONSTRUCTION INC.

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Westmont Construction
January 19, 2001
Page Three

Hypersensitivity pneumonitis is characterized by an inflammatory reaction in the alveolar walls and peripheral bronchioles in the lungs. Symptoms include chills, fever, dry cough, shortness of breath and tightness in the chest. Fungi identified as causes of hypersensitivity pneumonitis include *Penicillium*.

Anderson Environmental Consulting Group (AEC) recommends replacement of all subfloor and wall surfaces that have been exposed to water leaks. Moisture testing performed by AEC found elevated moisture levels in the subflooring in the laundry room, the wall between the laundry room and the family room, and the subfloor in the family room. All wood framing should be thoroughly dried and painted with a fungicidal coating prior to reassembling the floor, cabinet, and wall components and installing new floor coverings.

If you have any questions, please call me.

Very truly yours,

ANDERSON ENVIRONMENTAL CONSULTING GROUP

William W. Anderson

William W. Anderson
President